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C O N F I D E N T I A L SECTION 01 OF 03 BANGKOK 001776

SIPDIS

DEPARTMENT PASS USTR FOR BWEISEL
COMMERCE FOR JBENDER AND JKELLY

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TAGS: [EINV](#) [ETRD](#) [TH](#)

SUBJECT: MANAGING OUR TREATY OF AMITY AND ECONOMIC
RELATIONS (AER)

REF: A. (A) BANGKOK 001391

[1](#)B. (B) BANGKOK 001170

Classified By: Economic Counselor Michael J. Delaney. Reason: 1.4 (b,d
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[1](#)1. (C) Summary. The RTG has resumed routinely issuing approvals for US investments under the Treaty of Amity and Economic Relations (AER), so US investors again enjoy preferential, better than MFN access to the Thai market. The extension of AER benefits is conditional, and its legal status is fuzzy. Nevertheless, our priority goal of ensuring that US investors continue to have access to this market has been achieved and, with careful management, we think there is a reasonable chance that AER benefits can be extended indefinitely. A legal challenge to the RTG's interpretation of the AER carries a significant risk -- that the RTG will react by again stopping the issuance of AER-covered investment approvals. For now, we believe our current approach is the best available way to support US commercial interests. Our long term need for investor certainty and transparency awaits the replacement of the obsolescent AER with a modern and augmented trade and investment framework, that is, an FTA. End Summary.

US Investors Again Enjoy Preferential Access

[1](#)2. (C) As noted in ref a, the RTG has resumed issuing approvals for US services investments covered under the US-Thailand Treaty of Amity and Economic Relations (AER). As related by MFA PermSec Krit (ref b), resumption of approvals was prompted by the February 23 "Kitchen Cabinet" decision chaired by PM Thaksin. The Cabinet conditioned resumption on an "overarching concept:" that the US "join hands (with Thailand) to fend off any threat of Thailand being subject to litigation at the WTO. Working assumption on this is one of Thailand and the US being on the same side -- not on opposite sides."

The Politics of AER Revocation, and AER Reinstatement

[1](#)3. (C) The resumption of approvals was the culmination of weeks of intensive efforts by the Embassy. There was obviously a great deal of opposition within the RTG to reversing its earlier decision to withdraw from the two AER articles that are inconsistent with Thailand's current GATS obligations. The news that the RTG was no longer issuing approvals took us by surprise in January. We had calculated that the RTG would probably not make such a move for several reasons: it could jeopardize ongoing FTA talks; the AER facilitated much needed investment; and the chances for a GATS challenge seemingly had receded since the conclusion of the Thailand-Japan FTA.

[1](#)4. (C) What went wrong? In retrospect, we failed to appreciate the strength of the multilateralist, "Spirit of G-77" devotees within MFA (mostly) who can be counted on to scrupulously align themselves with WTO institutions in the event of an inconsistency between WTO rules and bilateral arrangements -- particularly bilateral arrangements with a non-G-77 country. Adherents to this view would argue that living up to Thailand's GATS obligations is of paramount importance and should not be influenced by the question of whether the RTG's unilateral withdrawal from all or part of the AER is legally sound. Details are murky, but we believe an important, albeit behind the scenes, player in this debate has been Surakiart Sathirathai, Deputy Prime Minister overseeing Foreign Affairs, Education and Culture. (Surakiart currently is Thailand's candidate for UN Secretary General.) Additionally, some believe that Surakiart was using the AER to somehow gain leverage in the FTA negotiations.

[1](#)5. (C) In the face of US lobbying and the postponement of FTA negotiations, other MFA elements (led by PermSec Krit) managed to take possession of the issue and forge the conditional agreement outlined in ref b. But the agreement bears the signs of continuing dissent within the MFA over this issue. As explained to us, two of the three elements of

the agreement are 1) a renegotiation of the Exchange of Notes to provide Thailand with "adequate legal comfort"; and 2) the resumption of approvals will be for a period of three months, renewable in 3-month periods. When we subsequently met with Commerce PermSec Karun Kittisataporn to learn when he would authorize resumption of investment approvals (MFA interprets and has legal authority over trade treaties, Commerce implements), we shared with him the non-paper presented to us by MFA. Circling with his finger the paragraphs detailing the three-month duration period, he said, "I haven't seen this paper. I attended the Cabinet meeting with the PM, and this three-month duration element was never discussed." FCS Bangkok reports that the office issuing the investment approvals says that it has been advised that the resumption is permanent. We believe Karun has issued instructions consistent with his understanding of the Cabinet decision, i.e., approvals are to be resumed with no specific time limit or expiration date.

16. (C) MFA probably added the three-month duration condition because it provides an easy way to revert to GATS compliance should circumstances warrant such a move, and in view of the chance that FTA talks may be postponed for a lengthy period (it also is a sop to opponents of this approach within MFA). We can think of two such circumstances. The first would be a threatened GATS challenge by a trading partner, e.g., Japan. The second would be US behavior that is clearly inconsistent with the "overarching concept" spelled out by PM Thaksin, "joining hands to fend off any threat of Thailand being subject to litigation at the WTO. . . . (and) Thailand and the US being on the same side -- not on opposite sides." Unlike the situation we were faced with in early 2005, we do not/not believe the continuance of AER benefits depends on agreement on language in the Exchange of Notes that constitutes a legal commitment from the US. (Note: As corroborating evidence for our belief, we note that one month after our meeting with Krit, we have yet to receive any proposed alternate language for the Exchange of Notes. End Note.) What the Thais are asking for -- the "overarching concept" -- is something more abstract: the evincing of an attitude by the US that we will support Thailand in its position within the WTO should the need arise.

17. (C) We believe (as does the RTG) that the threat of a GATS challenge is low and getting lower, so the first circumstance doesn't overly concern us, at least in the short term. The second circumstance will be determined by our actions. In 2005, unhappy with the US position on the AER, the RTG was faced with what it saw as a choice: violate its GATS obligations, or withdraw from the relevant articles of the AER. It opted to withdraw from the AER. It is reasonable to assume that the RTG will make the same choice if it sees itself as again being in the same position. That is why we are wary of any response to the RTG's current AER arrangements that emphasizes our legal interpretation of the AER and our view that any unilateral change could constitute a nullification or impairment of our rights under that treaty: such a move runs a substantial risk that the RTG will react by immediately ceasing issuance of approvals (the MFA could take the view that such a US position is hard to reconcile with the "overarching concept" of joining hands and "being on the same side"). In view of the difficulties we encountered the first time, we are not sure we will be successful in getting AER approvals restored a second time. Furthermore, the AER's dispute settlement provisions do not encourage us to use them: among other things, Article XIII of the AER states that the swing vote in a dispute settlement panel shall be designated by the Secretary-General of the United Nations.

You Don't Know What You Got 'Til It's Gone

18. (C) FCS and AmCham report that AER related applications are being processed normally, with no problems reported to date. Notwithstanding its legal fuzziness, from a commercial viewpoint the current arrangement is working well. There is a reasonable chance that the current "interim" arrangement can be continued indefinitely, and our actions can play a role in increasing those chances. Recent developments may help us in making the current "interim" solution more or less permanent. Now that the FTA is on hold and we have launched talks with the ROK and Malaysia, suddenly voices are being heard asking "without the FTA, where are we?" It may be some time before the political situation here is sufficiently settled to allow the Thais to reopen FTA talks with us. In the interim, it is in both of our interests to maintain positive trade relations and remain mindful that talks may begin again at some point.

No Substitute For A Modern, Comprehensive Trade/Investment Arrangement

19. (C) The only negative (a big negative, in our view) to the current arrangement is the lack of certainty that investments will continue to be approved in the future. But

to put this in perspective, uncertainty over future foreign investment policy has been part of the landscape here for some time. The US business community has been well aware of the looming expiry date of Thailand's GATS derogation. The expiry date been repeatedly cited here as one of the chief rationales for our FTA; everyone knows the AER is obsolescent and needs to be replaced, a fact that has lent urgency and support to the FTA project. Long term certainty for US business here awaits a modern, comprehensive trade and investment agreement -- we don't see any fully satisfactory substitute. We can only hope that the FTA process is resumed as soon as possible.

110. (C) State (ECON), FCS, and FAS have cleared this message.
BOYCE